



Court-Annexed Arbitration and Settlement Pressure: A Push Towards Efficient Dispute Resolution or "Second Class" Justice?

I. INTRODUCTION

This decade has seen ever-increasing case loads in both the federal and state court systems. While the cause of the current "litigation explosion" is a hotly debated topic, the undisputed result is growing dockets and lengthening delays in bringing civil suits to trial.¹ Suggestions for handling the increasing demands on court resources have ranged from simply expanding the number of courts and judges to complicated methods of alternative dispute resolution.² In the pursuit of judicial efficiency, the courts have experimented with a wide variety of alternative dispute resolution mechanisms. A sampling of programs includes mediation, arbitration, private judging, mini-trials, and summary jury trials.

One concern of alternative dispute resolution (ADR) programs is the propriety of using settlement pressure to eliminate cases from the docket. Tension exists between pushing parties to settle earlier than on the courthouse steps and unduly discouraging them from pursuing their rightful claims in court. Although some ADR programs perform an adjudicative function, the results are not binding and, thus, ADR resolves disputes only if the parties reach an agreement.³ Sanctions are used to increase the cost-effectiveness of alternative dispute resolution by creating an additional incentive to adopt the ADR result, instead of proceeding to trial. Although a certain amount of settlement pressure is permissible, the

1. For a general survey of the purported reasons for the "litigation explosion," see generally Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 5-11 (1983).

2. See generally Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1845-46 (1986) (creating a two-tier justice system); McMillan & Siegel, *Creating a Fast-Track Alternative under the Federal Rules of Civil Procedure*, 60 NOTRE DAME L. REV. 431, 431 (1985) (creating a faster time table for certain types of litigation); Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 393 (1986) (suggesting raising court filing fees).

3. See Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 673, 675 (1986); Levin, *Court-Annexed Arbitration*, 16 U. MICH. J.L. REF. 537, 541, 546 (1983); McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818, 822 (1988).

use of sanctions is constrained by the United States Constitution, state constitutions, and the appropriate functions of alternative dispute resolution.

This Note will explore one form of alternative dispute resolution and attempt to define the boundaries between acceptable pressure and coercion. Court-annexed arbitration, specifically compulsory proceedings, has been chosen for examination because of its inherent coercion. Unlike purely consensual programs, mandatory court-annexed arbitration requires the participation of the parties. The term "arbitration" is used instead of "mediation" because these programs typically involve at least one impartial party that sets a nonbinding award at the end of an informal hearing.⁴ Court-annexed arbitration (CAA) is also referred to as court-ordered arbitration or non-binding arbitration, to distinguish it from binding contractual arbitration.

Part II of this Note presents an overview of court-annexed arbitration and discusses its goals, focusing on its use as a settlement device. Part III briefly explores challenges to the propriety of a mandatory court-annexed program and demonstrates that absent pressure imposed by sanctions, a mandatory program is appropriate. Finally, Part IV analyzes commonly imposed sanctions and defines the boundaries of acceptable pressure by reference to the policies underlying court-annexed arbitration.

II. AN INTRODUCTION TO COURT-ANNEXED ARBITRATION

A. *A Description of a Typical Court-Annexed Arbitration Program*

Court-annexed arbitration is usually implemented in an effort to reduce court costs and backlog by encouraging litigants to settle before judicial resources have been expended on motion practice or trial.⁵ Court-annexed arbitration was initially administered by local rule because of its experimental nature, but recently has been mandated by state and federal legislators.⁶

4. For a definition and description of court-annexed arbitration, see Levin, *supra* note 3, at 537; McKay, *supra* note 3, at 828.

5. See S. CLARKE, L. DONNELLY & S. GROVE, COURT-ORDERED ARBITRATION IN NORTH CAROLINA 7 (1989) [hereinafter COA IN NORTH CAROLINA]; D. HENSLER, A. LIPSON & E. ROLPH, JUDICIAL ARBITRATION IN CALIFORNIA 12-13 (1981) [hereinafter JUDICIAL ARBITRATION IN CALIFORNIA]; E. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS at xii (rev. ed. 1983).

6. The initial experiment in the federal court system was administered by local rule in three district courts. N.D. CAL. TEMP. R. 500, D. CONN. R. 38, and E.D. PA. R. 49, reprinted in E. LIND & J. SHAPARD, *supra* note 5, at 99-118. The District of Connecticut later abandoned its CAA program. *Id.* at 137-38. The number of federal courts with CAA experimental programs was later increased to 10. In 1988, Congress authorized a five-year continuation of mandatory court-annexed arbitration in those districts, and the experimental

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The first step in implementing a court-annexed arbitration program is to define the criteria used to select cases.⁷ These criteria include factors such as the complexity of the litigation, the amount in controversy, and the subject matter of the suit.⁸ In a mandatory program, suits falling within the established parameters must be submitted to court-annexed arbitration before they will be allowed to proceed to trial. Cases are typically selected by a court administrator or clerk, who notifies the parties and coordinates the arbitration process.⁹ To increase the effectiveness of the proceeding and prevent delay, a hearing is typically required within a specified number of days.¹⁰ Cases are heard by panels of one to three arbitrators, who have been chosen for their legal knowledge or other relevant areas of expertise.¹¹ At the hearing, attorneys

use of voluntary CAA in 10 new districts. The 10 district courts with mandatory court-annexed arbitration programs include the following: N.D. Cal., M.D. Fla., W.D. Mich., W.D. Mo., D.N.J., E.D.N.Y., M.D.N.C., W.D. Okla., E.D. Pa., and W.D. Tex. 28 U.S.C. § 658 (1988). State legislatures that have implemented CAA include state programs in North Carolina and California. For a description of the operation of these programs, see COA IN NORTH CAROLINA, *supra* note 5, at 1-2; JUDICIAL ARBITRATION IN CALIFORNIA, *supra* note 5, at 9-14.

7. The following description of court-annexed arbitration is a compilation of several different programs. See generally JUDICIAL ARBITRATION IN CALIFORNIA, *supra* note 5, at 22-23; K. SHUART, THE WAYNE COUNTY MEDIATION PROGRAM IN THE EASTERN DISTRICT OF MICHIGAN 8 (1984); Levin, *supra* note 3, at 538; Levin & Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29, 32-33 (1985).

8. See 28 U.S.C. § 652(a)(1)(B) (1988) (limiting court-annexed arbitration in the federal courts to cases involving monetary damages less than \$100,000); CAL. CIV. PROC. CODE §§ 1141.11, 1141.15 (West 1982 & Supp. 1991) (civil cases in which the amount in controversy, in the court's opinion, is less than \$50,000, and exceptions granted for cause); DEL. SUP. CT. R. 16.1(a) (all civil cases are referred to compulsory arbitration unless counsel certifies in good faith that damages are in excess of \$50,000); HAW. CIR. CT. ARB. R. 6 (all tort cases with a probable jury award of less than \$150,000); N.C. CT. ORD. ARB. R. 1 (cases submitted to CAA are limited to those involving claims of less than \$15,000 and exceptions include family law, wills and estates, and class actions, among others). For a description of the California and North Carolina programs, see also D. BRYANT, JUDICIAL ARBITRATION IN CALIFORNIA: AN UPDATE 6 (1989); COA IN NORTH CAROLINA, *supra* note 5, at 3.

9. See N.D. CAL. R. 500-3(a) (selection and coordination by court clerk); M.D. FLA. R. 8.03(a) (selection and coordination by court clerk); D.N.J. R. 47(C)(1) (selection and coordination by court clerk); CAL. CIV. PROC. CODE § 1141.16(a) (West 1982 & Supp. 1991) (cases submitted after a conference with all parties to determine amount in controversy); N.C. CT. ORD. ARB. R. 8(e) (all nonjudicial functions in administering the program may be delegated to support personnel).

10. See 28 U.S.C. § 653(b) (1988) (hearings must be not more than 180 days after the answer is filed, but not less than 30 days after the court rules on motion for dismissal or summary judgment); DEL. SUP. CT. R. 16.1(f)(1) (hearing must be scheduled within 40 days after appointment of an arbitrator); N.C. CT. ORD. ARB. R. 8(b)(1) (hearing scheduled within 60 days).

11. Arbitrators are often chosen by the consent of the parties, but if they cannot agree, the court will appoint the arbitrators. N.D. CAL. R. 500-4(a) (If the parties do not consent, they are given a list of ten potential arbitrators, with each party entitled to strike two names. The parties then proceed, defendant first, to select a panel of three arbitrators by each choosing one name in turn.); M.D. FLA. R. 8.03(a) (panel consists of one to three arbitrators chosen by consent or randomly by the court clerk); D.N.J. R. 47 (D)(2) (one arbitrator chosen by the court clerk); DEL. SUP. CT. R. 16.1(d)(2)-(4) (arbitrator chosen by the agreement of the parties, or the court selects three alternative arbitrators and each party eliminates one); N.C. CT. ORD. ARB. R. 2(a) (one arbitrator is agreed upon by the parties

present their evidence in a summary fashion, and the hearing may be limited to a specific length of time.¹² The panel then sets an award that will be entered as the judgment, unless one of the parties moves to vacate the award within a set number of days.¹³ If either party contests the result, the suit will go to trial with no evidentiary use of the arbitration hearing.¹⁴ Most courts then attempt to place the case back on the court docket, as if it were never removed, to prevent the arbitration hearing from substantially delaying trial.¹⁵

B. Court-Annexed Arbitration as a Settlement Device

Court-annexed arbitration has been instituted experimentally in a number of courts.¹⁶ The goals of these programs are articulated as providing the litigant with timely justice and easing court congestion by removing cases from the docket at the earliest possible time.¹⁷

or selected at random by the court).

12. See D. CONN. R. § 7(g), (k), reprinted in E. LIND & J. SHAPARD, *supra* note 5, at 103-04 (discussing presentation of witnesses and proof, and limiting proceedings to two days); N.C. CT. ORD. ARB. R. 3(n) (proceedings limited to one hour, unless justice requires an extension).

13. See 28 U.S.C. §§ 654(a), 655(a) (1988) (a trial de novo must be demanded within 30 days after the arbitrator files the award with the court, or the award is entered as judgment); DEL. SUP. CT. R. 16.1(h)(1) (demand for trial must be filed within 20 days); N.C. CT. ORD. ARB. R. 5(a) (demand for trial must be filed within 30 days).

14. See, e.g., 28 U.S.C. § 655(c) (1988), which provides, in relevant part:

(c) Limitation on Admission of Evidence. The court shall not admit at the trial de novo any evidence that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding, unless—

- (1) the evidence would otherwise be admissible in the court under the Federal Rules of Evidence, or
- (2) the parties have otherwise stipulated.

See also CAL. CIV. PROC. CODE § 1141.25 (West 1982 & Supp. 1991); N.C. CT. ORD. ARB. R. 5(c), (d).

15. See 28 U.S.C. § 655(b) (1988), which provides, in relevant part:

(b) Restoration to Court Docket. Upon a demand for a trial de novo, the action shall be restored to the docket of the court and treated for all purposes as if it had not been referred to arbitration. In such a case, any right of trial by jury that a party otherwise would have had, as well as any place on the court calendar which is no later than that which a party otherwise would have had, are preserved.

See also CAL. CIV. PROC. CODE § 1141.20 (West 1982 & Supp. 1991); DEL. SUP. CT. R. 16.1(h)(2).

16. Court-annexed arbitration is currently in use in 21 states and 10 United States District Courts. Norris, *National Trends in Mandatory Arbitration*, THE COLORADO LAWYER 1313, 1313 (July 1988). Ten additional district courts were authorized to experiment with voluntary CAA in November of 1988. 28 U.S.C. § 658 (1988).

17. See JUDICIAL ARBITRATION IN CALIFORNIA, *supra* note 5, at 12; E. LIND & J. SHAPARD, *supra* note 5, at 1, 5.

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Accordingly, success is measured by (1) the frequency of trial de novo; (2) the cost to the litigants; (3) litigant and attorney satisfaction; and (4) the timeliness of adjudication and backlog reduction.¹⁸ Under these criteria, a program succeeds by encouraging parties to settle as early as possible, before otherwise utilizing court resources. The Constitution also limits the function of court-annexed arbitration to that of a settlement device rather than a true alternative adjudication. A program that substituted for trial and bound the participants to the result would be unconstitutional.¹⁹

Characterizing the process as a settlement device in no way detracts from its legitimacy. Since the current settlement rate is 90-95 percent,²⁰ protesting the use of court-annexed arbitration on the grounds that it merely encourages settlement ignores the realities of our judicial system. Given the high settlement rate, court-annexed arbitration simply encourages the most probable result and introduces an element of objectivity not present in traditional settlement negotiations.²¹ A well-designed program encourages those parties that will settle to do so at an earlier time, but leaves others free to pursue their litigation in court without undue penalty. Striking this proper balance is crucial to achieving the goals of court-annexed arbitration.

The proper balance can be determined by examining the settlement process. Settlement occurs when parties reach consensus as to the value of their claim and the undesirability of going forward with litigation.²² Suits fail to settle when the parties desire vindication, the attorneys have not completed the preparation necessary to evaluate the case, the parties or the attorneys do not realistically value the claim, or both sides are reluctant to propose settlement negotiations.²³ Court-annexed arbitration can help remove each of these barriers. Parties are given the opportunity to present their cases, with the objective input of a third party serving to

18. For a discussion of a model to evaluate the success of a program, see COA IN NORTH CAROLINA, *supra* note 5, at 15-23; E. LIND & J. SHAPARD, *supra* note 5, at 12-16.

19. See Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 565. For a discussion of the constitutionality of court-annexed arbitration, see generally N. ROGERS & C. McEWEN, *MEDIATION* 53-54 (1989); Golann, *supra*; Levin & Golash, *supra* note 7, at 45-46.

20. It is estimated that 93% of civil actions in the federal courts never reach trial. Of course some of these cases are terminated in ways other than settlement, for example, dismissal. Levin, *supra* note 3, at 541 & n.23 (citing DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANN. REP. 381, Table C-4 (1981)).

21. See COA IN NORTH CAROLINA, *supra* note 5, at 78 (CAA appears to replace settlement rather than adjudication). See also Levin, *supra* note 3, at 545-47. Levin discusses the dangers of treating CAA as a settlement device rather than as an adjudication. He emphasizes the importance in dealing with the litigants' claims on their merits to encourage perceptions of fairness and discourage resort to trial de novo. *Id.*

22. For a formal economic model of settlement, see Posner, *supra* note 2, at 369-71.

23. See E. LIND & J. SHAPARD, *supra* note 5, at 9-11, 78-80.

deflate unrealistic expectations of the parties or their counsel.²⁴ Attorneys must evaluate their cases in preparation for the hearing and are in a position to consider settlement.²⁵ Because the court selects cases for arbitration, neither party has to admit weakness by proposing settlement talks. By removing these obstacles to settlement, court-annexed arbitration helps parties reach consensus faster, which serves their interests as well as those of the judicial system.

An effective program must remove traditional obstacles to settlement without substituting new ones. Court-annexed arbitration cannot function if it is perceived as unfair because participants will not readily agree to an unfair award.²⁶ The parties will discount the award and the entire process, which will alienate litigants while failing to facilitate settlement.²⁷ Another unproductive influence is overformalization. A complicated process, a binding result, or heavy-handed sanctions all increase the dangers of delaying tactics and side litigation.²⁸ Fairness and a degree of informality are necessary to foster settlement without increasing the costs to the parties, the judicial system, and the public.

III. COMMON CHALLENGES TO COURT-ANNEXED ARBITRATION PROGRAMS

A. Court-Annexed Arbitration and Constitutional Concerns

One challenge to court-annexed arbitration is that the mandatory process itself is unduly coercive. Court-annexed arbitration has been challenged under state constitutions and the United States Constitution as violating the right to trial by jury, the equal protection clause, and the due

24. For a brief discussion of the value of third-party evaluation, see Rowe, *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation, Background Paper*, 1989 DUKE L.J. 824, 899.

25. Although the proceedings are not as formal as trial, the attorneys must present their cases and can be sanctioned for failure to participate. See *Gilling v. Eastern Airline*, 680 F. Supp. 169 (D.N.J. 1988) (failure to participate in arbitration by presenting no evidence on certain claims was sanctioned by imposing the other party's costs to prepare for arbitration); *Wahle v. Medical Center of Delaware*, 559 A.2d 1228 (Del. 1989) (plaintiff's suit dismissed for abuse of arbitration process, including repeated delay and refusal to furnish requested information). But see *Semiconductors, Inc. v. Golasa*, 525 So. 2d 519 (Fla. Dist. Ct. App.) (petitioner cannot be sanctioned for failing to send a representative with settlement authority to court-ordered mediation).

26. The importance of a fair procedure is the element where the dual functions of CAA as a settlement device and adjudication intersect. The arbitration hearing must be credible (by at least partially resembling an adjudication) in order to serve its purpose as a settlement device. See Levin, *supra* note 3, at 546-47.

27. *Id.*

28. Lind and Shapard speculate that there is a tension between formal structure and the goals of court-annexed arbitration: increased formality may raise perceptions of fairness while increasing costs and delay. E. LIND & J. SHAPARD, *supra* note 5, at 90.

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process clause.²⁹ Generally, courts have upheld mandatory programs against these attacks.³⁰

The right to a jury trial is not absolute and is not violated unless the procedure engenders undue delay or expense to the degree that it denies the parties the opportunity to proceed to trial.³¹ For constitutional purposes, the saving feature of mandatory ADR is that trial de novo is available at the request of either party.³² The mandatory nature of court-annexed arbitration, standing alone, does not violate litigants' constitutional rights.

B. *Court-Annexed Arbitration and the Rule-Making Authority of the Federal Courts*

Mandatory alternative dispute resolution in the federal courts has been challenged as an improper use of the courts' rule-making authority. Due to their experimental nature, alternative dispute resolution programs are often implemented in the federal courts by local rule.³³ The courts have rule-making authority under 28 U.S.C. Section 2071 to promulgate

29. See *Rhea v. Massey Ferguson, Inc.*, 767 F.2d 266 (6th Cir. 1985) (seventh amendment right to jury trial); *Kimbrough v. Holiday Inn*, 478 F. Supp. 566 (E.D. Pa. 1979) (seventh amendment right to jury trial); *Davison v. Sinai Hosp. of Baltimore*, 462 F. Supp. 778 (D. Md. 1978) (seventh amendment right to jury trial), *aff'd*, 617 F.2d 361 (4th Cir. 1980); *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977) (state constitutional right to jury trial and equal protection); *Firelock, Inc. v. District Court*, 776 P.2d 1090 (Colo. 1989) (en banc) (various provisions of Colorado Constitution and the fourteenth amendment right to procedural due process); *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980) (due process under U.S. and Florida Constitution); *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980) (state constitutional right to jury trial). For an analysis of the constitutionality of mandatory ADR, see generally Golann, *supra* note 19.

30. See *Rhea v. Massey Ferguson, Inc.*, 767 F.2d 266, 268 (6th Cir. 1985); *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 577 (E.D. Pa. 1979); *Davison v. Sinai Hosp. of Baltimore*, 462 F. Supp. 778, 781, n.78 (D. Md. 1978); *Eastin v. Broomfield*, 116 Ariz. 576, 580, 570 P.2d 744 (1977); *Firelock v. District Court*, 776 P.2d 1090, 1100 (Colo. 1989) (en banc). But see *Aldana v. Holub*, 381 So. 2d 231, 237-38 (Fla. 1980) (rigid time schedule that operates to deprive some parties of right to mediate violates due process under the state and federal constitutions); *Mattos v. Thompson*, 491 Pa. 385, 388, 421 A.2d 190 (1980) (mandatory scheme does not of itself violate right to jury trial, but oppressive delay does).

31. Golann, *supra* note 19, at 566. See *Rhea v. Massey Ferguson, Inc.*, 767 F.2d 266, 268 (6th Cir. 1985); *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 577 (E.D. Pa. 1979); *Davison v. Sinai Hosp. of Baltimore*, 462 F. Supp. 778, 781 (D. Md. 1978); *Eastin v. Broomfield*, 116 Ariz. 576, 580, 570 P.2d 744 (1977); *Firelock v. District Court*, 776 P.2d 1090, 1100 (Colo. 1989) (en banc). But see *Mattos v. Thompson*, 491 Pa. 385, 388, 421 A.2d 190 (1980) (oppressive delay violated right to jury trial).

32. See, N. ROGERS & C. MCEWEN, *supra* note 19, at 53-54; Levin & Golash, *supra* note 7, at 45-46.

33. For a description of the first three court-annexed arbitration programs in the federal district courts and the applicable local rules, see Levin & Golash, *supra* note 7, at 32 n.15. Since May 1989, the Judicial Improvements Act has regulated mandatory court-annexed arbitration in the federal courts, but the Act allows the district court to set many details by local rule. 28 U.S.C. §§ 651-658 (1988). See also N.D. OHIO R. 17.02 (granting judge authority to order a summary jury trial or other ADR mechanism).

rules that are not otherwise inconsistent with the Federal Rules of Civil Procedure or federal statutes.³⁴ In addition to their inherent rule-making authority, courts derive authority to order ADR from Rule 16 of the Federal Rules of Civil Procedure.³⁵ Challenges to court authority in this area have two prongs: (1) local rules are an inappropriate method of implementing significant changes; and (2) courts are not granted the authority to impose ADR on litigants by Rule 16.

In determining the limits of local rule-making authority, commentators tend to use one of two approaches. The more conservative view is that court rules should be used only to facilitate the administration of court business.³⁶ Court rules that are substantive rather than procedural create serious inconsistencies among courts.³⁷ Other commentators have urged that the flexibility inherent in local rules should be used to full advantage to permit experimentation with various test programs such as alternative dispute resolution.³⁸

34. 28 U.S.C. § 2071 (1988) provides that "[t]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." Rule 83 provides that:

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

FED. R. CIV. P. 83.

35. Rule 16 provides in relevant part:

(c) **Subjects to be Discussed at Pretrial Conferences.** The participants at any conference under this rule may consider and take action with respect to

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute; [and] (10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems[.]

36. 12 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 3152 (1982).

37. *Id.*

38. Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation or Information?*, 14 LOY. L.A.L. REV. 213, 218, 219, 275 (1981).

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Within their sphere of authority, courts are given discretionary power to promulgate rules.³⁹ The courts' inherent powers have not been tightly circumscribed and are given wide deference.⁴⁰ Nevertheless, courts may not directly contradict a rule or statute, or create rules that affect the outcome of the litigation.⁴¹ The fact that courts are granted wide discretion in rule-making does not dispose of the issue of court authority to order alternative dispute resolution. Because of the extraordinary nature of imposing ADR on unwilling litigants, courts must look beyond their inherent powers for authority.⁴²

Rule 16 of the Federal Rules of Civil Procedure may authorize court-annexed arbitration. The 1983 Amendments to Rule 16 can be read as authorizing various forms of extrajudicial proceedings to encourage settlement.⁴³ The majority of courts reviewing this question have found alternative dispute resolution consistent with the Federal Rules and have impliedly assumed that Rule 16 authorizes ADR.⁴⁴

Though the first court-annexed arbitration programs in the federal courts were administered by local rule, Congress statutorily authorized twenty district courts to experiment with court-annexed arbitration in 1988.⁴⁵ The Judicial Improvements Act sets jurisdictional limits, sanctions parties that request trial and fail to improve upon the arbitral award, and regulates various other administrative matters, while still allowing each court to use its local rules to tailor its program.⁴⁶ Because the courts have been granted explicit statutory authority to mandate court-annexed arbitration, the federal programs are immune from attacks based on the power of the federal courts to require compulsory nonbinding arbitration. However, the local rules implemented by each federal court must be

39. See Fed. R. Civ. P. 83.

40. See Levin & Golash, *supra* note 7, at 49.

41. Levin & Golash, *supra* note 7, at 50-51. See *Miner v. Atlass*, 363 U.S. 641, 648 (1960) (striking local rule regarding oral depositions that was inconsistent with Admiralty Rules). Cf. *Colgrove v. Battin*, 413 U.S. 149, 163-64 (1973) (local rule that provided for six-person rather than twelve-person jury was permissible).

42. Prior to the passage of the Judicial Improvements Act, the federal district courts that implemented court-annexed arbitration did so under the authority of a Justice Department experiment, funded by Congress. Levin & Golash, *supra* note 7, at 32 n.15. For a history of court-annexed arbitration in the federal courts prior to the passage of the Act, see HOUSE COMM. ON JUDICIARY, JUDICIAL IMPROVEMENTS AND ACCESS TO JUSTICE ACT, H.R. REP. 889, 100th Cong., 2d Sess. 31-34, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5982, 5991-94.

43. FED. R. CIV. P. 16(c)(7); FED. R. CIV. P. 16(c)(10).

44. See *Tiedel v. Northwestern Michigan College*, 865 F.2d 88 (6th Cir. 1988); *Kimbrough v. Holiday Inn*, 478 F. Supp. 566 (E.D. Pa. 1979). But see *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1987). See generally Note, *Incongruity in the Seventh Circuit: Do Federal Courts Have the Authority to Order Summary Jury Trials?*, 6 OHIO ST. J. DIS. RES. 131 (1990).

45. 28 U.S.C. §§ 651-658 (1988).

46. *Id.*

consistent with the applicable provisions of the Judicial Improvements Act.⁴⁷

IV. AN EXAMINATION OF SANCTIONS USED TO INCREASE SETTLEMENT PRESSURE IN COURT-ANNEXED ARBITRATION

A. *An Overview of Commonly Imposed Sanctions*

To insure that court-annexed arbitration is effective, many courts use sanctions to encourage the parties to accept the panel's decision. Sanctions attempt to maximize the benefits of the program by discouraging subsequent trials.⁴⁸ Proponents of sanctions theorize that litigants will never accept the arbitrator's recommendation unless significant costs are associated with rejecting it.⁴⁹ Courts have used a variety of sanctions, including attorney's fees, arbitrator's fees, and court costs.⁵⁰ Sanctions discourage trial de novo by penalizing parties that demand trial, but do not improve upon the arbitrator's decision. Court-annexed arbitration also influences litigants' behavior by creating an additional delay and the additional expense of preparing for the mandatory hearing. The remainder of this Note will be devoted to evaluating different sanctions and settlement pressures that are utilized by court-annexed arbitration programs.

B. *Assessing Attorney's Fees*

Assessing attorney's fees is the costliest of the three sanctions previously listed and is currently authorized in a handful of state court-annexed arbitration programs.⁵¹

At one time, attorney's fees were imposed as a sanction in the federal courts. In the Western District of Michigan, local rules allowed a party to assess actual costs against his opponent, including attorney's fees.⁵² Costs were shifted to the plaintiff who failed to accept the panel's

47. *Id.*

48. See Levin, *supra* note 3, at 538.

49. See JUDICIAL ARBITRATION IN CALIFORNIA, *supra* note 5, at 17-18; Levin, *supra* note 3, at 539.

50. See E.D. PA. R. 8, 7(E) (imposing arbitrator's fees); CAL. CIV. PROC. CODE § 1141.21 (West 1982 & Supp. 1991) (imposing arbitrator's fees and costs); HAW. CIR. CT. ARB. R. 25, 26 (imposing attorney's fees, limited to \$5,000, and costs).

51. WASH. REV. CODE § 7.06.060 (West Supp. 1991) (authorizes the supreme court to implement a rule that would permit the imposition of attorney's fees); see HAW. CIR. CT. ARB. R. 25, 26 (allowing the imposition of attorney's fees up to \$5,000).

52. W.D. MICH. R. 42. The relevant parts of the rule read as follows:

Rule 42. Mediation
(j) Effect of Mediation

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unanimous decision, and received a court judgment less than 10 percent greater than the panel's evaluation.⁵³ Likewise, costs were shifted to the defendant who failed to accept the panel's decision and had a judgment entered against him that was greater than 90 percent of the recommendation.⁵⁴ The Sixth Circuit held that the court did not have the power to shift attorney's fees by local rule.⁵⁵ The opinion relied on the exceptional nature of the remedy of charging attorney's fees and stated that the remedy is appropriate only when Congress has expressly created an exception to the American rule.⁵⁶

Congress has since declined to authorize the use of attorney's fees to encourage acceptance of awards obtained through court-annexed arbitration. The Judicial Improvements Act prevents federal courts from imposing any costs on parties involved in mandatory court-annexed arbitration, other than the arbitrator's fees.⁵⁷ The Act does permit the

(3) If the mediation panel's evaluation is unanimous and the defendant accepts the evaluation but the plaintiff rejects it and the matter proceeds to trial, the plaintiff must obtain a verdict in an amount which, when interest on the amount and costs from the date of filing of the complaint to the date of the evaluation are added, is more than ten (10) percent greater than the evaluation in order to avoid the payment of actual costs to the defendant.

(6) For good cause shown, the Court may order relief from payment of any or all costs as set out in subsections (j)(3) through (j)(5), above.

(k) **Actual Costs.** Actual costs include those costs and fees taxable in any civil action and attorney's fees for each day of trial as may be determined by the Court.

Although this is a mediation rule, the Michigan program in question is mandatory, and the hearing panel may recommend an award at the end of the proceeding. In these aspects, the program resembles arbitration more than mediation. See N. ROGERS & C. MCEWEN, *supra* note 19, at 77.

53. W.D. MICH. R. 42(j)(3), *reprinted infra* note 52.

54. W.D. MICH. R. 42(j)(4).

55. Tiedel v. Northwestern Michigan College, 865 F.2d 88, 94 (6th Cir. 1988). Although this case involved the local rule regarding mediation (Rule 42), the mediation process involved was similar to arbitration in that the mediator could enter an award. The Western District of Michigan has a similar rule regarding court-annexed arbitration with similar provisions. W.D. MICH. R. 43(j)(4).

56. Tiedel v. Northwestern Michigan College, 865 F.2d 88, 93 (6th Cir. 1988).

57. (d) **Taxation of Arbitrator Fees as Cost.**

(1) (A) A district court may provide by rule that, in any trial de novo under this section, arbitrator fees paid under § 657 may be taxed as costs against the party demanding the trial de novo.

(B) Such rule may provide that a party demanding a trial de novo under subsection (a), other than the United States or its agencies or officers, shall deposit a sum equal to such arbitrator fees as advanced payment of such costs, unless the party is permitted to proceed in forma pauperis.

(2) Arbitrator fees shall not be taxed as costs under paragraph (1)(A), and any deposited under paragraph (1)(B) shall be returned to the party demanding the trial de novo, if—

(A) the party demanding the trial de novo obtains a final judgment more favorable than the arbitration award, or

imposition of attorney's fees on parties that submit to voluntary arbitration and then demand a trial de novo, but only if (1) the party does not obtain a substantially more favorable result at trial; and (2) the court finds evidence of bad faith.⁵⁸ As enacted, the statute prevents the doubly coercive effect of imposing a prohibitive sanction upon parties compelled to participate in an experimental process.

Congress may nonetheless attempt to experiment with costlier sanctions in the near future. The Senate Judiciary Committee has recommended additional experimentation with financial incentives.⁵⁹ According to the Committee, "cost and fee incentives become more appropriate as the alternative procedures move from early informal pretrial hearings toward more formal proceedings, with significant discovery and more extensive hearings."⁶⁰ The Committee also stressed that because of the substantive overtones, incentives should be implemented by Congress, not local rule, and only as a controlled, limited experiment.⁶¹

No court has addressed whether Congress or a state legislature may shift attorney's fees as a sanction for demanding a trial de novo.⁶² The Supreme Court has indicated that taxing attorney's fees is permissible if authorized by statute.⁶³ However, unlike ADR sanctions,⁶⁴ most fee provisions assess fees for conduct that violates a specific statute, in order to encourage compliance.⁶⁵ The possibility of obtaining fees encourages

(B) the court determines that the demand for the trial de novo was made for good cause.

(4) Any rule under this subsection shall provide that no penalty for demanding a trial de novo, other than that provided in this subsection, shall be assessed by the court.

(e) **Assessment of Costs and Attorney Fees.** In any trial de novo demanded under subsection (a) in which arbitration was done by the consent of the parties, a district court may assess costs, as provided in § 1920 of this title, and reasonable attorney fees against the party demanding the trial de novo if—

(1) such party fails to obtain a judgment, exclusive of interest and costs, in the court which is substantially more favorable to such party than the arbitration award, and

(2) the court determines that the party's conduct in seeking a trial de novo was in bad faith.

28 U.S.C. § 655.

58. *Id.* § 655(e).

59. Report of the Federal Courts Study Committee 83-85 (April 2, 1990).

60. *Id.* at 84-85.

61. *Id.*

62. *Id.* at 92. Golann notes that "the most difficult questions concerning impairment of jury trial rights arise from ADR penalties." Golann, *supra* note 19, at 510.

63. *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 249 (1975).

64. *But see* Golann, *supra* note 19, at 510-11. Golann uses the existence of a multitude of other fee-shifting statutes as evidence that cost shifting in connection with mandatory ADR is constitutionally permissible.

65. *See, e.g.*, 42 U.S.C. § 1988 (1988) (courts have discretion to allow the prevailing party in civil rights litigation to recover reasonable attorney fees as part of costs).

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attorneys to bring civil suits for violations of the statute, and makes the statute self-enforcing.⁶⁶ The result is an additional penalty to those parties adjudged at trial to have violated the statute. In contrast, a statute similar to the Michigan local rule is enacted to encourage settlement and the result penalizes parties for pursuing their suit to trial. The question is whether the additional pressure to settle, when added to an already compulsory process, is an impermissible burden on the right to a jury trial.

The use of non-binding arbitration to shift attorney's fees is analogous to the use of Rule 68 of the Federal Rules of Civil Procedure to shift or cut-off fees.⁶⁷ Rule 68 provides that if a plaintiff rejects a settlement offer and then recovers a lower amount at trial, she cannot collect her own costs and must pay the defendant's costs incurred after the offer.⁶⁸ In *Marek v. Chesney*, the Supreme Court held that when attorney's fees are shifted under a separate statute, costs under the Federal Rules include attorney's fees.⁶⁹ The Court strongly favored settlement over litigation, stating that "application of Rule 68 will require plaintiffs to 'think very hard' about whether continued litigation is worthwhile; that is precisely what Rule 68 contemplates."⁷⁰ The effect of Rule 68 is

66. The legislative history to 42 U.S.C. § 1988 states that "[a]ll of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." SENATE JUDICIARY COMM., THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, S. REP. NO. 1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5910.

67. Golann also discusses the relationship between Rule 68 and cost shifting as part of mandatory ADR. Golann, *supra* note 19, at 511.

68. The Rule provides that:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

FED. R. CIV. P. 68.

69. *Marek v. Chesney*, 473 U.S. 1 (1985).

70. *Id.* at 10-11.

somewhat mitigated by the fact that it does not apply when the plaintiff loses at trial.⁷¹

In *Marek v. Chesney*, the Supreme Court decisively favored settlement over litigation and allowed fee-shifting to encourage settlement.⁷² A reasonable extension of this rationale is that attorney's fees may be statutorily imposed against parties that do not accept the arbitrators' award.⁷³ The cases referred to non-binding arbitration typically involve contract or tort disputes and exclude suits alleging violation of constitutional rights.⁷⁴ The operation of a CAA statute would appear to be less drastic than the Court's interpretation of Rule 68, which applies to suits that allege constitutional violations.⁷⁵ Court-annexed arbitration also provides additional protection for the parties by requiring an impartial evaluation of the case. The addition of a disinterested party prevents attempts by one party to cut-off attorney's fees by knowingly offering an inadequate settlement figure, and using Rule 68 as a weapon to coerce settlement.⁷⁶

The combination of compulsory arbitration and shifting attorney's fees still raises serious questions of an impermissible burden on the right to trial by jury.⁷⁷ At least some state courts would probably invalidate this type of statute as a violation of their state constitution's jury trial or court access provisions.⁷⁸

Even though a fee-shifting statute may be constitutional, the statute would violate the policies underlying court-annexed arbitration. In an era of rising fees, shifting attorney's fees can mean thousands of dollars, even in relatively uncomplicated cases. Because of the dollar amounts involved, imposing fees is a highly coercive sanction. Shifting attorney's fees based on the result of a pretrial hearing threatens the parties into settling or pursuing the matter in court at their own peril. The stronger the pressure on the parties to accept the arbitral award, the more likely

71. *Delta Airlines, Inc. v. August*, 450 U.S. 346 (1981).

72. See *supra* notes 66-68 and accompanying text.

73. See Golann, *supra* note 19, at 511.

74. See *supra* note 8 and accompanying text.

75. The plaintiff in *Marek v. Chesney* alleged a violation of civil rights under 28 U.S.C. § 1983. 473 U.S. 1, 3 (1985).

76. See Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 315 (1989) (discusses the offensive use of Rule 68 to coerce inadequate settlements); Simon, *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 40 (1985) (the threat of imposing attorney's fees has a greater impact on civil rights plaintiffs).

77. But see Golann, *supra* note 19, at 567 (concluding that imposing costs on disputants that reject ADR results does not raise a serious constitutional question, as long as fees are taxed only against parties that do not better their position at trial, and not as a per se cost on all litigants).

78. Levin & Golash, *supra* note 7, at 57. Some states look with disfavor on any infringements of the right to jury trial created by a mandatory hearing. See *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980).

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they are to forego trial, regardless of their proper objections to the award.⁷⁹ The focus of court-annexed arbitration then changes from that of a court-supervised settlement device to a substitute for trial, overlooking the fact that the panel's decision is based on a highly abbreviated procedure.⁸⁰

The use of heavy-handed tactics should be carefully scrutinized in light of CAA's goal of facilitating settlement while upholding confidence in the judicial system. Sanctions may not reduce the number of cases settling, but still may alienate users of the system by creating perceptions of unfairness.⁸¹ The time and expense incurred in pursuing a matter to trial are substantial. For this and other reasons, the vast majority of cases (90-95 percent) settle before trial.⁸² It may be impossible to significantly reduce the already low percentage of disputes that proceed to a trial *de novo*.⁸³

Although sanctions cannot have a large impact on the percentage of cases settling, costly sanctions introduce an element of coercion into the bargaining process.⁸⁴ Altering the balance of settlement negotiations is one of the goals of court-annexed arbitration, but the process is supposed to equalize bargaining positions, not create additional pressure on litigants with limited means.⁸⁵ Costly sanctions may cause the parties to reluctantly forego their right to trial and may undermine parties' perceptions of fairness, which are crucial to the success of court-annexed arbitration.⁸⁶

Indeed, increased enforceability of the arbitral award may actually lead to more trials by generating side litigation.⁸⁷ As the award becomes more enforceable, the proceeding itself may become more adversarial in nature. One unproductive side effect of adversarial behavior would be

79. In discussing the impact of Rule 68, Simon concluded that sanctions strong enough to substantially increase settlement also coerce settlement on litigants with meritorious claims. Simon, *supra* note 76, at 76.

80. See *supra* note 12 and accompanying text.

81. For the importance of maintaining the litigants' perceptions of fairness, see Levin, *supra* note 3, at 546-47.

82. See Galanter, *The Federal Rules and the Quality of Settlements: A Comment on Rosenberg's, The Federal Rules of Civil Procedure in Action*, 137 U. PA. L. REV. 2231, 2232 (1989) (time, money, attention, opportunity costs, and uncertainty all affect whether a particular case settles or proceeds to trial). See also *supra* note 20 and accompanying text.

83. For a discussion of the difficulty of targeting the small number of cases that will ultimately go to trial, see Galanter, *supra* note 82, at 2233.

84. "Disincentives are an attempt to improve court efficiency by lowering the numbers of parties who can afford to or dare to use the trial apparatus." N. ROGERS & C. MCEWEN, *supra* note 19, at 75-76.

85. *Id.* at 76 (sanctions have the greatest impact on parties with limited resources).

86. See Levin, *supra* note 3, at 546-47; Note, "No Frills" Justice: North Carolina Experiments with Court-Ordered Arbitration, 66 N.C. L. REV. 395, 417 (1988) (Fairness is an important component in litigants' decision to accept arbitral award as final).

87. N. ROGERS & C. MCEWEN, *supra* note 19, at 81.

purposeful delay.⁸⁸ Because speed of dispute resolution is one of the primary goals of court-annexed arbitration, increased delay decreases the effectiveness of the process.⁸⁹ As the award becomes more enforceable, the incentive to engage in tactical maneuvering becomes greater. A formal and adversarial process may eliminate the very benefits sought from alternative dispute resolution.

C. Assessing Arbitrator's Fees and Other Court Costs

Parties that demand a trial de novo may also be assessed court costs or arbitrator's fees.⁹⁰ Like attorney's fees, court costs are shifted to parties that demand trial and fail to significantly improve upon the arbitrator's award.⁹¹ Attorney's fees will usually be more expensive than court costs, but costs can still represent a substantial expense. Some courts require that arbitrator's fees be automatically collected from the party that demands a trial de novo and refunded only if the party improves his position at trial.⁹² Other courts do not impose arbitrator's fees until after trial.⁹³

Provisions for imposing arbitrator's fees are fairly common among court-annexed programs.⁹⁴ Imposing costs is somewhat less common.⁹⁵ In *Kimbrough v. Holiday Inn*, the court held that federal courts have the power to impose arbitrator's fees and post-award interest by local rule.⁹⁶ These sanctions were approved as "a valid deterrent for frivolous appeals

88. Increased formalization leads to increased delays due to additional preparation time. E. LIND & J. SHAPARD, *supra* note 5, at 89-90. Similarly, the more final the decision, the more preparation will be required. Some evidence that attorney behavior may delay arbitration proceedings may be presented by California's CAA program. Cases referred to mandatory arbitration take longer to reach disposition than cases that are submitted to CAA voluntarily. JUDICIAL ARBITRATION IN CALIFORNIA, *supra* note 5, at 95.

89. For a general discussion of the importance of making court-annexed arbitration a timely process, see E. LIND & J. SHAPARD, *supra* note 5, at 78-83. According to Lind & Shapard, the real benefits of court-annexed arbitration derive from early pre-hearing settlement. These benefits are maximized by adherence to early deadlines. *Id.* at 78-80.

90. For an example of an arbitrator's fee provision, see 28 U.S.C. § 655(d), *reprinted supra* note 57.

91. See CAL. CIV. PROC. CODE § 1141.21 (West 1982 & Supp. 1991); HAW. CIR. CT. ARB. R. 25, 26.

92. For example, see N.C. CT. ORD. ARB. R. 5(b) (fees are paid upon filing, refunded if party does not improve position at trial); 28 U.S.C. § 655(d)(1)(B), *reprinted supra* note 57.

93. See CAL. CIV. PROC. CODE § 1141.21 (West 1982 & Supp. 1991); DEL. SUP. CT. R. 16.1(h)(4).

94. See 28 U.S.C. § 655(d), *reprinted supra* note 57; CAL. CIV. PROC. CODE § 1141.21 (West 1982 & Supp. 1991); DEL. SUP. CT. R. 16.1(h)(4); N.C. CT. ORD. ARB. R. 5(b).

95. See CAL. CIV. PROC. CODE § 1141.21 (West 1982 & Supp. 1991); WASH. REV. CODE § 7.06.060 (West Supp. 1991); HAW. CIR. CT. ARB. R. 25, 26.

96. *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 575-77 (E.D. Pa. 1979).

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and a means to promote swift, efficient dispute-resolution.⁹⁷ Thus, unlike attorney's fees, costs and arbitrator's fees can be imposed by local rule. One reason for the difference may be that charging costs is a traditional sanction in the American legal system and does not affect the functioning of the adversarial system to the same degree as does charging attorney's fees.⁹⁸

As discussed in the preceding section, shifting attorney's fees after a trial de novo is probably constitutional.⁹⁹ Because it does not violate the American Rule and as a penalty is significantly lower in dollar amount than attorney's fees, imposing court costs should also survive constitutional attack.¹⁰⁰

Congress has expressly forbidden the federal courts from using any sanction other than arbitrator's fees against parties that reject the arbitrator's award in a mandatory court-annexed arbitration program.¹⁰¹ However, court costs are still imposed as a sanction in some state programs¹⁰² and could be authorized for use in the federal courts at a later date.¹⁰³

One proper purpose of imposing costs is to have users bear part of the costs of court-annexed arbitration and to deter frivolous appeals.¹⁰⁴ Sanctions should bear a reasonable relationship to the value of the suit to deter frivolous appeals, but not unduly punish the litigant with a good faith cause of action.¹⁰⁵ Reasonable limits prevent undue pressure to settle, while still shifting a portion of the system's costs to its participants. Arbitrator's fees are less problematic than court costs or attorney's fees because the amount is certain and usually reasonable.¹⁰⁶

Even added together, limited costs and arbitrators' fees may not provide a great deal of additional pressure to settle, but strong pressure

97. *Id.* at 575 (discussing the holding of *Smith's Case*, 381 Pa. 223, 112 A.2d 625 (1955)).

98. *See Tiedel v. Northwestern Michigan College*, 865 F.2d 88, 92-94 (6th Cir. 1988) (discussion of reasons that court may not impose attorney's fees by local rule).

99. *See supra* notes 62-75 and accompanying text.

100. Even attorney's fees may be constitutionally shifted by statute. *See supra* notes 62-75 and accompanying text.

101. *See supra* note 56 and accompanying text.

102. *See supra* note 94 and accompanying text.

103. *See supra* notes 56-58 and accompanying text. An interesting side note to the current statute that limits the federal courts to the use of arbitrator's fees as sanctions is the interaction between that statute and Rule 68 of the Federal Rules of Civil Procedure. Although the courts cannot impose court costs as a sanction, can a party achieve the same result by making a settlement offer after arbitration of an amount close to the arbitral award?

104. *See Levin & Golash, supra* note 7, at 56 (indicating that sanctions are a deterrent and can be considered a user's fee of sorts).

105. *See id.* at 56-57.

106. For example, the California Civil Code limits each arbitrator's fees to \$150 per day and fees for the panel to \$250 per day. N.D. CAL. R. 500-4(d). *See also* N.C. CT. ORD. ARB. R. 2(c) (\$75 limit); E.D. PA. R. 8(2) (\$75 limit per arbitrator).

coerces the parties needlessly.¹⁰⁷ The litigant's own expenses and time involved to pursue the matter to trial already pressure litigants heavily towards settlement.¹⁰⁸ Court-annexed arbitration should help parties agree earlier, without adding significant costs in order to force settlement on unwilling litigants. An additional danger of higher sanctions is increased side litigation concerning the propriety of sanctions.¹⁰⁹ A fine hand is necessary to maintain the delicate balance between a process that will be effective, speedy, and fair.

D. *The Expense and Delay Imposed by the Hearing*

One result of a court-annexed arbitration program is the expense of preparing for the hearing and any delay created by requiring litigants to complete an ancillary procedure prior to trial. Although these effects are not intended to sanction litigants, they do represent additional costs imposed on all parties, some of which will proceed to trial. Any resulting delay should be kept to a minimum in order to maintain user satisfaction.¹¹⁰ Indeed, most programs require that cases be placed back on the docket as if they were never removed from the system.¹¹¹ This practice is obviously the most equitable, but also may be somewhat difficult to administer.¹¹² Absent this type of provision, the best way to avoid unnecessary delay is to strictly enforce deadlines. For example, a court could require that a hearing be held within ninety days after the commencement of a suit.¹¹³ As well as furthering the goal of speedy

107. See COA IN NORTH CAROLINA, *supra* note 5, at 77 (even though the North Carolina program does not utilize any sanctions other than arbitrator's fees, some attorneys cited the cost of the procedure as their reason for not proceeding to trial); J. ADLER, D. HENSLEY & C. NELSON, SIMPLE JUSTICE, HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 88 (1983) [hereinafter SIMPLE JUSTICE] (speed of disposition is increased by allowing the parties to determine whether their case falls within the jurisdictional dollar amounts, which in reality makes the process voluntary).

108. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076-77 (1984) (discusses financial pressures on certain litigants to settle that will always exist because of parties differing economic circumstances).

109. N. ROGERS & C. MCEWEN, *supra* note 19, at 81 (discussing the possibility of satellite litigation); Simon, *supra* note 76, at 26 (discussing the conflicting pressures in formulating sanctions).

110. See Note, *supra* note 86, at 412 (time limits that reduce cost increase user satisfaction).

111. See *supra* note 15 and accompanying text.

112. Delay in scheduling cases for trial may affect user satisfaction, but may not affect CAA effectiveness as measured by cost-benefit analysis. See R. MACCOUN, E. LIND, D. HENSLEY, D. BRYANT & P. EBENER, ALTERNATIVE ADJUDICATION, AN EVALUATION OF THE NEW JERSEY AUTOMOBILE ARBITRATION PROGRAM 72-73 (1988) [hereinafter N.J. AUTOMOBILE ARBITRATION] (manner in which arbitrated cases are scheduled for trial has little effect on trial de novo rate).

113. See E. LIND & J. SHAPARD, *supra* note 5, at 78-80 (strict deadlines help increase the benefits from CAA).

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resolution, this rule limits any additional delay imposed on the parties to a definite period.

Another cost imposed by mandatory arbitration is the expense incurred in preparation for the hearing. Preparation costs are an inevitable part of any adjudicative process, whether traditional litigation or ADR. The justification for these costs is the possible acceptance of the arbitration award or enhanced settlement negotiations.¹¹⁴ If CAA does not resolve disputes, then this is an additional cost for parties that proceed to trial.¹¹⁵ The imposition of these costs is justified only if the litigants and the courts receive some benefit from the process.¹¹⁶ Those who arbitrate and then proceed to trial receive no benefit; those who accept the award receive the maximum benefit; and the value to those who settle between the hearing date and trial is unclear. It is the effectiveness of the proceeding itself that justifies the expense of preparation as an inevitable, but worthwhile, cost. Uncertainty about the effectiveness of CAA is one more reason to keep these costs as low as possible. The cost of preparation can be limited by using an abbreviated and informal procedure. As long as discovery for purposes of court-annexed arbitration is limited in scope and the proceeding is kept simple, these costs do not create undue settlement pressure, or are at least justified in the experimental stages of CAA.

Courts consider delay and preparation expense a permissible side effect of court-annexed arbitration. At least one court, however, has looked unfavorably on excessive delays (more than one year) created by the operation of a program.¹¹⁷ A well-designed and administered program can avoid unnecessary delay by requiring arbitration within a set period of time and providing for strict adherence to deadlines.¹¹⁸ Another suggestion that commentators have made to reduce cost and delay is to use one arbitrator instead of panels of three to five.¹¹⁹ Simplicity of procedure also maintains speedy processing and reduces preparation costs.¹²⁰

114. See JUDICIAL ARBITRATION IN CALIFORNIA, *supra* note 5, at 82 (litigants' costs are saved only if there is no trial de novo).

115. For a discussion of the dangers of increasing costs without resolving disputes, see Rowe, *supra* note 24, at 900-01; Note, *supra* note 86, at 412-14.

116. *Id.*

117. *Mattos v. Thompson*, 491 Pa. 385, 388; 421 A.2d 190 (1980).

118. See Note, *supra* note 86, at 414; SIMPLE JUSTICE, *supra* note 107, at 87.

119. See E. LIND & J. SHAPARD, *supra* note 5, at 88-89 (suggesting the use of one arbitrator instead of three); N.J. AUTOMOBILE ARBITRATION, *supra* note 112, at 73 (reduction of number of arbitrators has no effect on the trial de novo rate).

120. Increasing the formality of CAA may create a desire for additional preparation time, which may lead to corresponding delays. E. LIND & J. SHAPARD, *supra* note 5, at 89-90. Additional procedural requirements may unnecessarily impose these additional costs on the parties. Litigants see informality as one of the benefits of CAA, in comparison to the formalities of trial. See N.J. AUTOMOBILE ARBITRATION, *supra* note 112, at 73; SIMPLE

V. EVALUATING SANCTIONS IN LIGHT OF THE CONSTRAINTS AND PURPOSES OF ALTERNATIVE DISPUTE RESOLUTION

The main objection to the use of sanctions in connection with court-annexed arbitration is the creation of additional pressure to accept the results of a mandatory extrajudicial proceeding. Binding arbitration does not offend traditional notions of fairness because the parties have contracted to settle their differences outside of the judicial system. Nor does it seem overly burdensome to require parties to submit to a brief, nonbinding procedure prior to exercising their right to access to the courts. Problems arise when the two ideas are combined due to overzealousness to ease court congestion.

Forcing parties to resort exclusively to extrajudicial alternatives to trial is clearly in conflict with the policies underlying the judicial system. Courts do not have the authority under local rule, and legislators should not restrict access to the courts through the circuitous route of increasing sanctions for rejecting the results of alternative dispute resolution. While restricting some parties' access to the courts, coercive sanctions may not even yield the desired result of easing court congestion. Furthermore, the creation of side litigation offsets the benefits of alternative dispute resolution for both the court and the litigants.

Court-annexed arbitration is a hybrid between an early, informal adjudication and a settlement device. At its best, it provides the parties with a hearing on the merits of their case, and serves as a catalyst for early settlement. At its worst, it creates additional time and expense for litigants that are determined to proceed to trial and forces other litigants to settle for "second-class justice." Excessive sanctions significantly increase the danger of creating the second type of court-annexed arbitration program: unjust and coercive.

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